Supreme Court, U.S.
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No. 03-241

In The

Supreme Court of the United States

QWEST CORPORATION,

Petitioner,

v.

METRONET SERVICES CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KENNETH SEELEY
METRONET SERVICES CORPORATION
12803 NE 139th Court
Kirkland, Washington 98034
(425) 814-9884

JAMES L. PHILLIPS
Counsel of Record
BROOKS E. HARLOW
MILLER NASH LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101
(206) 622-8484

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondent submits that the following question more accurately reflects the issue presented by the ruling below:

Whether, at the summary judgment stage, MetroNet has created triable issues of fact as to whether Qwest's change to a per location pricing scheme for Centrex violated Section 2 of the Sherman Act by illegally maintaining a monopoly over the market for small business local telephone service in Seattle/Tacoma.

RULE 29.6 STATEMENT

MetroNet Services Corp. and MetroNet Telemanagement Corp. are now known collectively as MetroNet Services Corp. It is a Washington corporation which does not have any parent or subsidiary corporations. No other corporations own any interest in it nor does it own any interest in any other corporation.

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BRIEF IN OPPOSITION

Respondent MetroNet respectfully requests that the Court deny the Petition for a Writ of Certiorari in its entirety.

COUNTER STATEMENT OF THE CASE

Introduction

In 1991, long before the passage of the Telecommunications Act of 1996, Qwest decided that resellers of one of its telecommunications products, Centrex, were a competitive threat. To counter this threat Qwest devised and imposed a pricing scheme, per location pricing, the purpose of which was to eliminate and/or destroy resellers of Centrex.

In 1996, the Washington Utilities and Transportation Commission abolished per location pricing and found that it was "discriminatory and in practice operate[d] to benefit [Qwest]." Pet. App. 7a.

In 1997, Qwest successfully reimposed per location pricing on one element of the Centrex product, the features component. The scheme had its desired result and it led to MetroNet's inexorable slide toward insolvency. Finally, in January 2000, MetroNet brought suit against Qwest, alleging that the change in the pricing scheme constituted a violation of Section 2 of the Sherman Act.

Despite the obfuscation and rhetoric in Petitioner's brief, MetroNet's claim is simple, basic, and grounded in long-tested antitrust law. Qwest consciously changed its behavior in order to exclude competition and hence violated 15 U.S.C. § 2. *Aspen Skiing Co. v. Aspen Highlands*

Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985); *Image Technical Services Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).

Qwest now claims that it imposed per location pricing in order to "fine-tune those discounts [in order] to take account of evolving market conditions." Petitioner's Brief, p. 2. At every level of appeal, Qwest has changed its argument.[1] This argument is just the latest example. The Ninth Circuit carefully reviewed the record and held:

> Qwest has not asserted any procompetitive justification for per location pricing. It is undisputed that per location pricing has no cost-based justification, *compare Oahu Gas*, 838 F.2d at 368 (economic necessity justified allegedly exclusionary conduct), and Qwest has not suggested how per location pricing enhances efficiency or improves the products offered to consumers, *see Microsoft*, 253 F.3d at 59.

Pet. App. 32a. Qwest did not "fine tune its discounts." Qwest changed its pricing policy to eliminate resellers because they were successfully competing with Qwest's business by offering small businesses a useful telecommunications product that Qwest had refused to do.

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[1] In its motion for summary judgment Qwest did not contend that the 1996 Telecommunications Act preempted MetroNet's antitrust claim. However, on appeal, Qwest contended "*for the first time* . . . that the 1996 Act preempts MetroNet's antitrust claims." Pet. App. 18a (emphasis added). In fact, in its pleadings before the district court, Qwest never cited to the case of *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000). However, before the Ninth Circuit, the *Goldwasser* case was Qwest's primary support for the position that the 1996 Act preempted MetroNet's antitrust claims.

Facts

This case involves two telecommunications products: flat rate local exchange lines (hereinafter referred to as "1FB") and Centrex. Centrex consists of two components, the line ("the access component") and "features" which provides call forwarding, call waiting, and call hold. Pet. App. 4a-5a. The line is regulated while "features" is not. Pet. App. 5a. Despite being repeatedly ordered to sell them separately, Qwest continued to sell both the line and "features" bundled together. Pet. App. 5a. Qwest initially intended Centrex to be sold to medium and large businesses wherein each location would contain 20 or more lines. Pet. App. 5a. Centrex was intended to compete with private business exchanges. Centrex had several advantages. First, it eliminated the need for a switch. *Id.* Second, it offered significant volume discounts in price. *Id.*

As for small businesses, because they typically had fewer than 20 lines per location, they were expected to purchase the higher priced 1FB.

In the mid-1980s, MetroNet discovered it could purchase the discounted Centrex lines and, by aggregating the lines from several small businesses, offer the small businesses the discounted Centrex product. This allowed small businesses to have the advantages of the Centrex product at a price lower than what they were paying for the 1FB.[2]

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[2] The ability of MetroNet, as a reseller, to bring a product to small businesses that was not otherwise available illustrates the valuable role resellers play in the growth of competition in the telecommunications industry. This valuable role has been recognized by the appropriate

(Continued on following page)

By the early 1990s, Qwest had become aware of this activity. The evidence is undisputed about what happened next. Qwest decided to change the pricing policy for Centrex in order to eliminate or reduce the number of resellers like MetroNet. Pet. App. 6a. Instead of counting the lines in a Centrex package ("system pricing"), Qwest decided to change its pricing policy to require each customer to have 20 or more lines in each location ("per location pricing"). Pet. App. 6a. This change in policy had two effects: it eliminated the ability of resellers, like MetroNet, to offer Centrex to small businesses and it forced small businesses to shift from Centrex to the more expensive 1FB. Pet. App. 6a.

Because the line component was regulated, Qwest had to seek regulatory approval of the per location pricing scheme. Initially, the Washington Utilities and Transportation Commission ("WUTC") approved per location pricing but on April 11, 1996, the WUTC refused to allow Qwest to further impose per location pricing finding "the existing arrangements [per location pricing] are discriminatory and in practice operate to benefit [Qwest]." Pet. App. 7a. The abolition of per location pricing alarmed

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regulatory bodies. *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 F.C.C.2d 167 at ¶ 7 (FCC 1980); and WUTC v. US West, Fourth Supplemental Order, WUTC Docket Nos. UT-911488, UT-911490, UT-920252 at 17-18 (WUTC November 18, 1993) (holding "resale . . . [is] an essential adjunct of free access to, and the growth of competition in, telecommunications service. They bring appropriate market pressures to bear on the underlying provider . . . and allow aggregation, combination and coordination of services to supply smaller customers whose needs may be uneconomic for the original supplier . . . ").

Qwest because it threatened its market share. Qwest wrote:

> The current Washington tariff structure for Centrex Plus, [1FB], and features offers a profitable, relatively low risk opportunity for Centrex resellers to win significant market share of 1FB customers (mainly small business) in Washington. In essence, it appears that resellers can operate with positive margins while reselling [Centrex] at anywhere from 10 to 35 percent discounts to [1FB lines] not including features.

Pet. App. 7a. Qwest was concerned about halting the loss of revenue and market share to resellers. Pet. App. 7a-8a.

Because the "features" component was unregulated, Qwest could arbitrarily and without regulatory scrutiny price "features" in any fashion it wanted. Therefore, on April 18, 1997, Qwest reimposed the per location pricing scheme on the "features" component of Centrex. Pet. App. 8a. Qwest was able to do this because it possessed market power in the relevant market.

It is undisputed that this reimposition increased the cost of "features" 400% to MetroNet's customers. Pet. App. 30a. Additionally, it is undisputed that the reimposition meant resale customers had to pay nearly six times more for Centrex than what medium and large businesses were paying for Centrex. Pet. App. 30a. Finally, it is also undisputed that there was no cost based or volume based

justification for per location pricing. Pet. App. 30a.[3] As the Ninth Circuit held:

> The 1997 switch from system pricing to per location pricing for Centrex features was freely undertaken by Qwest in an effort to eliminate resale.

Pet. App. 22a. Petitioner's brief now claims that the reimposition of per location pricing was part of a larger discount program that, "considered as a whole, represents welfare enhancing competition." Petitioner's Brief, p. 18. This is colorful rhetoric but far from the truth. Qwest reimposed per location pricing for one simple reason; to eliminate competition.

The reimposition of per location pricing had its desired effect as MetroNet slid slowly but surely into insolvency. Pet. App. 8a.

Procedural History

On January 10, 2000, MetroNet filed the present action alleging that Qwest's change in its pricing policy violated 15 U.S.C. § 2, as well as the essential facilities doctrine. Subsequently, Qwest moved for summary judgment and on April 16, 2001, the district court granted Qwest's motion.

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[3] Qwest now claims that the Ninth Circuit insisted on a cost based justification. Petitioner's Brief at p. 19. This plainly distorts the Ninth Circuit's opinion. The Ninth Circuit was simply observing that Qwest has never offered any business justification for reimposition of per location pricing whether it be based on cost, volume, or any other reason.

As to MetroNet's Section 2 claim, maintenance of monopoly, the district court concluded that the 1996 Telecommunications Act had removed many of the barriers to entry and that any remaining barriers "will diminish in time as new firms build their infrastructure, gain a toe-hold in the market, advertise more widely and gain wider recognition." Pet. App. 24a. The district court went on to hold that, based on these assumptions, Qwest's 95 percent market share "could well evaporate in the coming years without antitrust involvement." *Id.*

As to the opinion of MetroNet's expert that there still, despite the 1996 Act, existed significant barriers to entry (*see* Pet. App. 25a), the district court held "MetroNet's expert overstates the case for high barriers to entry in the market." Pet. App. 25a.

The district court also found that Qwest could not control prices due to competition in the market. Pet. App. 27a. In part, the district court concluded that Qwest could not control prices due to WUTC regulation. Pet. App. 27a. The district court ignored the evidence in the record to the contrary. Pet. App. 27a.

Finally, the district court found that MetroNet could not establish harm to consumer welfare because market competition prevented Qwest from raising prices of Centrex above competitive levels. Pet. App. 29a. The district court came to this conclusion despite the undisputed evidence that per location pricing increased the price of "features" for customers 400 percent and that it was

almost six times the price paid by medium and large businesses for Centrex. Pet. App. 30a.

As to MetroNet's essential facilities claim[4] the court found that, with respect to the first element, the "control" element, that Qwest could not control its essential facilities because the 1996 Telecommunications Act required interconnection. Pet. App. 37a. The district court held that even if per location pricing constituted exclusionary pricing, thus eliminating MetroNet, "there will still be competition in the market for local business phone service for wholesalers and from firms with their own facilities . . . " Pet. App. 37a-38a. The district court reached this conclusion despite evidence in the record to the contrary. Pet. App. 38a.

With respect to the second element concerning duplication of the facility, the district court held that competitors could gain access to Qwest's local switched access network through 1FB lines at wholesale and that "features" could be purchased on the open market at competitive prices. Pet. App. 38a-39a. Again, these conclusions were not based on the record and ignored evidence to the contrary. Pet. App. 39a.

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[4] In order to prevail on an essential facilities claim, MetroNet must prove the following elements: (1) that Qwest is a monopolist in control of an essential facility, (2) that MetroNet as a Qwest competitor is unable to reasonably or practically duplicate the facility, (3) that Qwest has refused to provide MetroNet access to the facility, and (4) that it is feasible for Qwest to provide such access. *See City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992) (citing *MCI Communications Corp.*, 708 F.2d at 1132-33). *See* Pet. App. 36a.

With respect to the third element, the denial of reasonable access, the district court required MetroNet to prove that per location pricing made the sale of Centrex unprofitable and that "any unprofitability was caused solely by Qwest's pricing policy." Pet. App. 40a. The court held that MetroNet could not prove these requirements.

After summary judgment of dismissal, MetroNet filed an appeal and on May 21, 2003, the court of appeals issued its amended opinion. The Ninth Circuit reversed the district court's summary judgment of dismissal of MetroNet's Section 2 and essential facilities claim. Pet. App. 45a.

First, the court of appeals rejected Qwest's argument that the 1996 Telecommunications Act preempted MetroNet's antitrust claim.[5] The court of appeals, just as the Second and Eleventh circuits have done, found:

> The plain language of the statute reveals that Congress intended the 1996 Act to coexist with, rather than preempt, the antitrust laws.

Pet. App. 20a. *See also Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89, 109-13 (2d Cir. 2002) (as

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[5] Qwest now claims that the court of appeals "knocked down a straw man" because it was not arguing for implied immunity. *See* Petitioner's Brief, p. 8. This is sophistry. It is true Qwest did not use the words "implied immunity." But it is also true that Qwest, for the first time on appeal, argued that the 1996 Telecommunications Act, because of its pervasive regulation, prevents Qwest from being liable under the essential facilities doctrine. This argument, in effect, states that Qwest is immune from antitrust liability as a result of the provisions of the 1996 Telecommunications Act.

amended), *cert. granted on part sub. nom. Verizon Communications v. Law Offices of Curtis V. Trinko*, ___ U.S. ___, 123 S. Ct. 1480, 155 L. Ed. 2d 224 (2003); *Covad Communications Co. v. Bellsouth Corp.*, 299 F.3d 1272, 1280-82 (11th Cir. 2002).

As to MetroNet's Section 2 maintenance of monopoly claim, the court of appeals found that the district court improperly weighed the evidence and failed to view the facts in a light most favorable to MetroNet. Pet. App. 25a. Additionally, the court of appeals found that the district court had "substituted its own speculations about present and future barriers to entry for the evidence in the record." *Id.* The court of appeals found MetroNet had proffered sufficient evidence to create triable issues of fact on monopoly power, exclusionary conduct, and antitrust injury to proceed with the monopolization claim. Pet. App. 36a. With respect to the affirmative defense of a procompetitive justification, the court of appeals found "Qwest had not asserted *any* procompetitive justification for per location pricing." Pet. App. 32a (emphasis added).

The court of appeals also reversed the district court on MetroNet's essential facilities claim finding that the district court had come to conclusions not supported by the record. Pet. App. 38a. The court of appeals also found that the district court's requirement that MetroNet prove *any* unprofitability was caused *solely* by Qwest's pricing policy overstated MetroNet's burden. Pet. App. 40a (emphasis in text).

REASONS FOR DENYING THE PETITION

Petitioner's petition for a writ of certiorari should be denied because the resolution of *Trinko* will not impact MetroNet's case and the Ninth Circuit's opinion reversing the district court's order of summary judgment rests on antitrust principles that are beyond dispute and attack.

Petitioner's first argument is that the MetroNet case should be "held pending this court's disposition of *Trinko*." Petitioner's Brief, p. 9. This reasoning is flawed and should be rejected.

Trinko involves a class action where the class consists of indirect customers of Verizon. Because *Trinko* involves issues involving standing, it could be resolved in a manner that has nothing to do with MetroNet. If MetroNet is held and *Trinko* is resolved on narrow grounds, MetroNet will have been held for no reason at all. MetroNet filed its complaint in January of 2000 and deserves its day in court.

Second, petitioner makes a broadside attack on the essential facilities doctrine. *See* Petitioner's Brief, pp. 11-13. Again, this is a new argument, never before raised by Qwest, and it should be rejected on that basis. Additionally, while Petitioner cites to criticisms of the essential facilities doctrine, nowhere does it inform the court that the doctrine has been accepted by all 12 courts of appeal[6]

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[6] *See e.g.*, *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90

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and as the Ninth Circuit indicated, the doctrine is derived from *United States v. Terminal Railroad Association*. 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912).

Moreover, the essential facilities doctrine fits the telecommunications industry perfectly. For 100 years, Petitioner and its ilk have been given state sanctioned, protected, ratepayer monopolies over local switched access service. Thus, the essential facility truly is unable to be practically duplicated. Every telecommunication competitor must connect to the Petitioner's essential facility in order to compete. This type of situation gives Petitioner an inordinate advantage over competitors like MetroNet and a real ability to distort the connection through many ways to make competition illusory.

Second, Petitioner claims that MetroNet's antitrust lawsuit will "upset this delicate statutory balance and threaten Congress' plan for promoting long-term facilities based competition." Petitioner's Brief, p. 14. If one pierces the colorful rhetoric, this argument boils down to one point: the 1996 Telecommunications Act impliedly immunizes

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F.3d 737, 748 (3d Cir. 1996); *Advanced Health-Care Services v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid Texas Communications Sys., Inc. v. AT&T Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Vernon v. Southern California Edison Co.*, 955 F.2d 1361, 1366-67 (9th Cir. 1992), *cert. denied*, 506 U.S. 908 (1992); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications v. Bellsouth Corp.*, 299 F.3d 1272, 1285-88 (11th Cir. 2002); *Intergraphic Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-57 (Fed. Cir. 1999).

Petitioner's anticompetitive behavior from antitrust scrutiny. In order to make this argument, Petitioner has to completely ignore the plain language of the statute that describes how the 1996 Telecommunications Act was meant to "coexist with, rather than preempt, antitrust law." Pet. App. 20a. Telecommunications Act of 1996, §§ 601(b)(1), (c)(1), 110 S. Ct. 56, 143 (1996), *codified* at 47 U.S.C. § 152. Historical and Statutory Notes.

Finally, Petitioner argues that its petition should be granted because the Ninth Circuit analysis of exclusionary conduct is erroneous. Petitioner's Brief, pp. 15-20. Petitioner protests that the per location pricing scheme was "meant to increase its short term (as well as long term) profits by targeting its discounts more precisely to the large business customers that would otherwise reject Centrex. . . ." Petitioner's Brief, p. 16. As mentioned before, Petitioner was not "targeting its discounts." It is beyond argument that it imposed per location pricing in order to eliminate competitors. The argument that per location pricing was intended to increase short term profits by targeting its discount is Petitioner's latest "spin" on what it is truly doing. As the Ninth Circuit stated:

> The 1997 switch from system pricing to per location pricing for Centrex features was freely undertaken by Qwest *in an effort to eliminate resale.*

Pet. App. 22a (emphasis added). And later the Ninth Circuit held:

> Qwest has not asserted any procompetitive justification for per location pricing.

Pet. App. 32a. Apparently Petitioner believes that all a monopolist has to do is to set a goal of achieving "short term

(as well as long term) profits" and all anticompetitive behavior used by a monopolist in achieving this goal will be excused. This is not the case and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

KENNETH SEELEY
METRONET SERVICES CORPORATION
12803 NE 139th Court
Kirkland, Washington 98034
(425) 814-9884

JAMES L. PHILLIPS
Counsel of Record
BROOKS E. HARLOW
MILLER NASH LLP
4400 Two Union Square
601 Union Street
Seattle, Washington 98101
(206) 622-8484